(1) Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

RICHARD A. HENDERSHOT AND JAMES BATTISTA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court must hold a *Remmer* hearing with a juror exposed to extraneous information in a criminal trial?

2. Is that hearing waived when defendant asks no questions of a source of extraneous information?

3. Is *Remmer* still the rule of the land and exposure to extraneous information presumed prejudicial with the prosecutor having a duty to rebut the prejudice? In a criminal trial does the defendant now have the duty to show prejudice by that exposure?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of *Certiorari* issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and has been designated for publication, but is not yet published.

JURISDICTION

The date on which the United States Court of Appeals decided this case was April 4, 2003.

No petition for rehearing was timely filed in our case.

An extension of time to file the petition for a Writ of *Certiorari* was granted to and including September 1, 2003, on June 5, 2003, in Application No. 02A1039.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves a violation of the Sixth Amendment of the U.S. Constitution in that defendant's right to a trial by an impartial jury was violated.

STATEMENT OF THE CASE AND REASONS FOR GRANTING WRIT

The district court's failure to hold a *Remmer* hearing when it was brought to the court's attention that extraneous information may have been introduced to a juror violated defendants' rights to a fair trial as guaranteed by Article VI of the U.S. Constitution, by depriving them of their rights to an impartial jury. The court's substitution of a hearing with the source of this information, rather than with the juror exposed to the extraneous information, violated the court's ruling in *Remmer v. United States,* 346 U.S. 884, 74 S.Ct. 98 (1954). Since that ruling, any exposure of extraneous information to a juror during a criminal trial has required a hearing to determine whether a defendant was prejudiced by the introduction of extraneous information.

Under *Remmer,* prejudice to a defendant is presumed when it is brought to the court's attention that extraneous information may have been introduced at trial, and it is the duty of the prosecutor to rebut the presumed prejudice.

Currently, the burden of showing prejudice is now shifted to the defendant. Some circuits are not holding *Remmer* hearings to question a juror exposed to extraneous information, but holding informal hearings with the source of extraneous information to determine whether that source could have tainted the jury. Unless a defendant shows prejudice, a juror is not questioned and no *Remmer* hearing is held.

The Seventh Circuit in the *United States v. Lanas, Hendershot and Battista* (hereafter *Hendershot*) ruled that the defense by not questioning a source of extraneous information to a jury, after being given the opportunity to question the possible source of extraneous information, had waived its right to have a hearing on whether that expo-

sure affected a juror's thinking and that information's effect on the entire jury. That juror was never questioned.

The facts of *Hendershot* are such: after almost six days of trial testimony, one of the defendant's attorneys brought to the attention of the judge the fact that a spectator, currently present in the court, had been attending and observing the entire trial. This spectator was unknown to any of the defendants or their families.

The spectator, a gentleman named Carl Bell (Bell), was called to the bench outside the presence of the jury (the jury had not yet been brought in for the day) and questioned by the judge about who he was and why he was observing the trial. Bell advised the court that he had been attending the trial daily and was a friend of one of the juror's hearing the case. Bell rode the train with that juror, a Mrs. Alexander, to and from trial daily.

Bell heard a lot of testimony and received information that the jury did not. Information was developed during trial that a government witness's testimony, Mike Rusin (Rusin), was put on the Internet in summary form the night of his testimony and the complete transcript was made available to a defense witness prior to his testimony. This caused the U.S. Attorney to question the witness's credibility, and hearings were conducted outside the presence of the jury with that witness and a court reporter to ascertain the effect of this knowledge on the witness's testimony as well as how the transcript became available. The judge, Rebecca Pallmeyer (Pallmeyer) , was concerned about how details of excluded testimony were disseminated and expressed this concern in open court to all parties. The jury was not present for either the testimony or the judge's remarks, but Bell was. This knowledge of possible wrongdoing by a key defense witness and the remarks by Pallmeyer could have prejudiced Alexander against Hendershot, if relayed to Alexander during a conversation with Bell.

In addition to that information, Bell may have heard an FBI agent accuse Hendershot of leaking the transcript to the defense witness. In fact, Agent Kuba ran into the hallway immediately after the judge's comments and declared to another FBI agent, "It's Hendershot or his wife." (Meaning to investigate them as the source of the leaked transcript.)

Hendershot's wife works at the Illinois Industrial Commission. In court, outside the jury's presence, the U.S. Attorney advised District Judge Pallmeyer, in response to an inquiry on the status of an investigation that the FBI was conducting on the transcript, that a summary before the complete transcript had been typed and put on the Internet of Rusin's testimony and had appeared at the Illinois Industrial Commission. Hendershot's wife testified on his behalf. Much of this testimony rebutted government theories on sources of his money to pay DePaul University, and contradicted the government's physical records. Hendershot's wife's credibility was made suspect by the agent's statement.

The atmosphere of suspicion that Hendershot or his wife was the source of the leaks of Rusin's transcript permeated the last four days of his trial, and affected the perceived testimony of his important rebuttal witnesses, as well as casting Hendershot and his wife's character for honesty in a bad light.

In fact, Bell was not only present for all courtroom proceedings, but he was privy to many conversations between prosecution and defense lawyers, defendants, and witnesses by virtue of his sharing and using the only men's room located outside the courtroom door.

When questioned by Judge Pallmeyer, Bell described his daily presence and contact with Alexander but denied that he ever discussed the case with her. Bell was not questioned under oath and after stating that they (Alexander

and Bell) took their oath not to discuss the case outside of the courtroom seriously, was not questioned by Hendershot's attorney. This failure to question Bell further led the Seventh Circuit to rule that Hendershot had waived his right to a *Remmer* hearing.

Clearly, Bell was an extraneous source of facts and opinions to Alexander. Alexander should have been questioned at a *Remmer* hearing since the presumption of prejudice to the jury's unbiased opinion, because of its exposure through Alexander to Bell's observations, belonged to the prosecution, and the prosecution did nothing to rebut that presumption. In fact, the prosecution never asked Bell any questions.

The rule of *Remmer* is that when a trial court is advised that an extrinsic influence may have tainted the trial, the proper remedy is a hearing to determine the circumstances of the improper conduct. *Remmer* is silent on whether the hearing should be held with the source of the possible taint or with the juror exposed to that taint.

The burden of showing prejudice shifted to Hendershot when a source of extraneous information came to the attention of Judge Pallmeyer and a hearing was held with that source, with the judge exercising discretion on whether to question the jury. The prosecutor played no role in the analysis, and in Hendershot's case, never asked the source (Bell) any questions. Yet, Judge Pallmeyer ruled that in her opinion no prejudice could have occurred, and the juror was not questioned. The Seventh Circuit went further by ruling that because no questions were asked of Bell, Hendershot waived his right to a *Remmer* hearing with Alexander.

The Third Circuit followed that rule in *United States v. Horning*, 848 F.2d 1040, 1045 (1988). In *Horning*, two days after trial, one of the jurors contacted the government's counsel to indicate that he had a conversation outside the

courtroom with a bank employee regarding a possible bad act that the defendant had committed at the employee's bank. The juror was questioned about that conversation, but the overwhelming evidence of defendant's guilt rebutted the presumption.

The exposure to an extraneous influence also prompted a closed door *Remmer* hearing to determine juror contact with evidence not admitted into evidence in *United States v. Calibus,* 821 F.2d 887, 897 (1987). In *Calibus*, a Second Circuit case, defense counsel discovered that one of the jurors had consulted a telephone directory not in evidence to determine where the defendant had lived prior to a certain date to help that juror decide whether a witness's testimony was credible. The judge in that case took unsworn testimony from ten jurors and sworn testimony from the juror exposed to the extraneous information.

The Ninth Circuit has even gone so far as to hold that a new trial was required where the jury was exposed to extraneous information highly prejudicial (as in this case) to the defendant, even though it was unclear whether the jury considered or discussed the information.

In *United States v. Vasquez,* 597 F.2d 194, the Circuit Court judge discovered that the jury had been exposed to a court file containing redacted jury instructions and other documents, which had been left inadvertently in the jury room for four hours. A hearing with the jurors revealed that several of the jurors had glanced through the files. The possibility that at least one of the jurors had been exposed to some of the prejudicial information was too great for the court to conclude that the verdict had not been affected by the extraneous information, id.

Like the Seventh Circuit, the First and Tenth Circuits disregarded the presumption of prejudice to be rebutted by the prosecutor, replacing that presumption with a *voir dire* examination of a witness by the defense. In both circuits,

the burden and presumption of prejudice was overcome by the judge's examination of the witness who was the source of the extraneous information, and by the defendant having to present rebuttal evidence showing actual prejudice.

In *United States v. O'Brien,* 972 F.2d 12, 14 (1st Cir. 1992) the court conducted an inquiry with a police officer who had spoken to three jurors in the corridor of the courtroom during a recess. The officer had been in the courtroom as a witness for the government. The judge conducted an examination of that officer and permitted the defense counsel and the prosecutor to *voir dire* him. The judge never questioned the three jurors and refused to do so, ruling that sufficient evidence was produced to state that the communications would not affect the jury.

A Tenth Circuit case is similar on the facts. A juror and a federal agent who had been sitting at the prosecutor's table during the trial had a conversation in the restroom during a recess. The agent and the juror exchanged greetings, which brought a response from the juror that he felt "sleepy". At that time, the agent remarked, referring to a tape recording which the government intended to put into evidence, "Well, this may put you to sleep." The court determined that the conversation was merely a "casual time-of-the-day greeting", and was not prejudicial to the defendant. See *United States v. Day,* 830 F.2d 1099, 1104 (10th Cir. 1987). The Appellate Court went further and stated that it was the obligation of the appellant's (defendant's) to establish prejudice. *Id at* 1106.

Alternately, the Sixth Circuit vacated a conviction and remanded for a *Remmer* hearing a case where the district court denied the defendant the opportunity to question a juror who was potentially influenced by extraneous information. *United States v. Herndon,* 156 F.3d 629, 637 (6th Cir. 1998).

In *Herndon*, a juror sent a note to the judge during jury deliberations indicating that he believed he may have had prior dealings with the defendant. The Appellate Court found that the Circuit Court abused its discretion by denying Herndon the opportunity to question the juror and vacated Herndon's conviction and sentence, and remanded the case for a *Remmer* hearing.

In another Sixth Circuit case, *United States v. Pennell,* 737 F.2d 521, 522 (1984), the Sixth Circuit ruled that prejudice is not to be presumed, and as in *Herndon*, the court explicitly held that the burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality.

The court in *Pennell* followed the U.S. Supreme Court's guideline that altered the law concerning unauthorized communications with jurors. The Supreme Court's opinion in *Smith v. Phillips,* 455 U.S. 209, 102 S.Ct. 940, 71L. Ed 2d (1982), seemed to shift the burden of proof to the defendant to demonstrate that unauthorized communications with a juror resulted in actual juror partiality. Prejudice is not to be presumed. The court did imply that deference could be accorded by the district court's findings made after a properly conducted *Remmer* hearing was held, but the burden shifted on rebutting or proving prejudice.

In *United States v. Perkins,* 748 F.2d 1519 (11th Cir. 1984), in a case similar to *Herndon*, a juror failed to reveal during *voir dire* that he had served on a committee with the defendant and had previously known him. A hearing was denied by the district court on a new trial motion. On appeal, the Eleventh Circuit reversed, stating that extraneous information may have influenced the verdict.

The Sixth Amendment prescribes no specific test for determining the impartiality of a jury, *Frazier v. United States,* 68 S.Ct, 201, 335 U.S. 497, 93 L.Ed 187.

The court must determine if alleged juror bias or prejudice amounted to a deprivation of rights guaranteed in the Sixth Amendment. The First, Sixth, Seventh and Tenth Circuits do not follow *Remmer* as to whether the exposure to extraneous information affected a jury's decision, and do not hold a *Remmer* hearing with the juror exposed to the extraneous information. The Second, Third, Ninth, and Eleventh Circuits follow *Remmer* guidelines and conduct a hearing with a juror exposed to the extraneous information to determine the effect of that information on that juror.

The burden of showing prejudice shifted to Hendershot when a source of extraneous information came to the attention of Judge Pallmeyer, and a hearing was held with that source with the judge exercising discretion on whether to question the jury. The prosecutor played no role in the analysis and, in Hendershot's case, never asked the source (Bell) any questions. Yet, Judge Pallmeyer ruled that in her opinion no prejudice could have occurred, and the juror was not questioned. The Seventh Circuit went further by ruling that because no questions were asked of Bell, Hendershot waived his right to a *Remmer* hearing with Alexander.

Because Hendershot's right to an impartial jury trial in a criminal trial was violated, and the Seventh Circuit put the burden on him to show prejudice to the exposure, Hendershot's Sixth Amendment right to an impartial jury was violated. A *Remmer* hearing should have been held with the juror. We ask that this writ be granted.

CONCLUSION

The petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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DATED: AUGUST 15, 2003